

APPLICANT No. _____

**Arkansas Bar Examination
July, 2007**

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TORTS**

One quiet Sunday afternoon in the Fall of 2005 Mary Frost was driving to her parents for supper. Jack Frost, Mary's husband, was working the second shift at Ajax Tool and could not join the family for their customary Sunday evening meal. Mary and Jack's kids, eight year old Kirby, five year old Rebecca and three year old Harry, were in the car with Mary...all properly restrained in car seats except Kirby for whom a car seat was not required. Kirby and Mary wore their seatbelts.

Mary was traveling East on Dallas St. as she approached the traffic light at the intersection with Park Ave. in the family's hometown of Horizon, Arkansas. Jeb Smith, also traveling East on Dallas, was to the rear of Mary's car as both approached the traffic light.

Jeb, a sixteen year old high school student, was on his way to visit his girlfriend, Francesca. As he trailed behind the Frost's car Jeb pecked out a text message on his cell phone to Francesca to let her know the time of his arrival. Jeb concluded his message and looked up and immediately crashed into the rear of Mary's car sending it careening into the intersection. Cars traveling North and South on Park Ave. skillfully maneuvered around the Frost's car without colliding with it.

Jeb was unhurt. Mary and each of the three children sustained serious neck and back injuries, as well as many bumps and bruises. The safety restraints appeared to effectively prevent even more serious injury to the occupants of the Frost vehicle.

The investigating police officer quickly determined that Mary had pulled to a proper controlled stop at the traffic light as it "turned to red" for her direction of travel. On the other hand, Jeb had not seen the light change nor Mary stop, as was clear from the absence of braking or skid marks at the scene. The officer also took the statements of several witnesses to the accident.

The Frost family has been unable to resolve their claims arising from the accident by agreement and come to you to advise them what causes of action each has from the accident and injuries suffered. You are also asked to explain against whom the suit will be filed. Finally, they ask if there is any chance they may lose their lawsuit.

Base your answer on the facts provided and reasonable inferences which may be drawn from those facts. For each member of the Frost family who, in your opinion, has a claim that can be asserted in the lawsuit you will file, please describe and discuss the following matters:

- the name of the family member and the nature or kind of claim to be filed (e.g. strict liability, negligence, breach of warranty);
- the elements of damage to be claimed by each family member;
- the identity of each defendant that you will include in the suit(s); and
- the prospects for success of the suit(s) to be filed on behalf of the Frosts.

Arkansas Essay, July 2007

Torts

Negligence is the only cause of action that is supported by the facts presented. There is no allegation that a product failed or that any persons other than Jeb and Mary were personally involved in the automobile collision. There is no evidence of intent to support a claim of battery. There is no contract for a breach of warranty, and it would be unnecessary to plead an exotic cause of action such as trespass to chattel. Arkansas does not recognize negligent infliction of emotional distress. There is no death, so there is no wrongful death action.

Elements of Negligence

The elements of negligence are commonly stated as (1) duty, (2) breach of the duty, (3) proximate causation, and (4) damages. The duty presented in this case is the duty to conform to the standard of ordinary care, defined as the care that a reasonably careful person would normally undertake to avoid unreasonable injuries to third parties. Based on Jeb's failure to pay attention while driving and subsequent collision with Mary's automobile, there should be little question that he breached his duty of ordinary care, and that that breach was the cause of both property damage and physical injuries to members of the Frost family. Jeb will not be excused by his young age--by undertaking the adult activity of driving an automobile, he assumed an adult's standard of ordinary care. While it is commendable that the Frosts wore their safety belts, by statute this will not be admissible in any case to prove or disprove negligence or contributory fault.

Possible Defendants

The case against Jeb is relatively straightforward, however, he is not the only defendant against whom the Frosts may recover. Under Arkansas law, the person who signs a minor's driver's license application is jointly and severally liable with the minor for any damages caused by the minor while operating a motor vehicle. As well, there may be evidence that the person who entrusted Jeb with his car could be liable for negligent entrustment, if we find evidence that the car owner had reason to know that Jeb was likely to be an unsafe driver. Finally, the Frosts may be able to recover the balance of any provable damages from their uninsured motorists' coverage, if available. Under the Arkansas "made whole" rule, the insurance company will not be able to recover in subrogation until all of the Frosts' claims for damages have been satisfied. Assuming the owner of the car Jeb drove had the automobile insurance required by Arkansas law, we should be able to recover damages up to the state mandatory policy limits.

When we file suit, we will join all of the possible defendants to this action, all based on the theory of negligence, vicarious liability, or negligent entrustment. Any action for negligence is barred by the statute of limitations if not filed within three years of when the cause of action accrued. Therefore, the Frosts' claims should be filed on or before the Fall of 2008. If necessary, an action can be filed against all known defendants and a number of "John Does" to toll the statute for one year.

The remainder of this essay will focus on the specific elements of damage that may be claimed by each family member, based on their neck and back injuries, and the damages to the automobile. I will assume that we can prove that none of these injuries were pre-existing and were not aggravated by any failure to mitigate on the Frosts' part.

Mary Frost

Mary may claim damages for her personal injuries, to be measured by the duration, extent, and nature of her injuries. She may also recover for any medical care that was necessary for her to obtain and the present value of any future medical care reasonably anticipated to be necessary for her future needs. When I say "present value," I mean the sum of future needs will be reduced to reflect the current earning power of money (i.e. interest rates). If she was disfigured she may recover for disfigurement without regard to whether the disfigurement is remediable or causes humiliation. She may also recover for pain and suffering and emotional distress, because the collision of the two automobiles was sufficient to satisfy the "contact rule." Emotional distress is a broad term that includes annoyance, humiliation, fright, worry, etc. She may also recover generically for "loss of enjoyment of life," although there is no specific jury instruction for this type of damage.

Mary may also recover for lost wages for any time that she was unable to work during the course of her injuries. She can recover for loss of future earning capacity if she is unable to work in the future. She can recover for her car, based on the difference in market value between the moment before the collision and the moment right after.

Jack Frost

Jack may recover for loss of consortium for the reasonable value of any loss of his wife's services and companionship caused by her neck and back injuries. This may, however, require that Jack undergo some uncomfortable discovery regarding his and Mary's personal and sexual lives. This cause of action is considered secondary to Mary's claim for damages, so it should be made at the same time as her lawsuit for negligence.

Arkansas does not recognize loss of consortium for parents and children, so he may recover for his loss of companionship with Rebecca.

Rebecca, Harry, and Kirby Frost

The children may recover, just as Mary did, for any personal injuries, disfigurement, pain and suffering, emotional distress, or loss of enjoyment of life. If the amount of these damages are large, it may be appropriate to appoint a guardian ad litem to specifically protect the childrens' interests as against their parents. This may be done on the court's motion.

If the children are permanently disabled, they may recover for the disability and for any lost future earning capacity they would reasonably incur in the future. Because the children are all so young, it will be difficult to ascertain their future earning capacity, so there will likely need to be evidence of average worker's wages estimated in the future, and if there are special reasons to deviate upwards from that average.

Jack & Mary Frost, as parents of Rebecca, Harry, and Kirby

Jack and Mary may recover for any caretaking expenses or medical care they have provided on the children's behalf, and any they are likely to need to provide in the future until the children reach the age of 18.

Conclusion

This case should settle, because recovery before a court of law is highly probable. The fact of Jeb's negligence is apparent from the facts, so any lawsuit against him will likely focus on the amount of damages he has caused. He will be jointly and severally liable with the person who

signed his driver's license and any person who "negligently entrusted him" with the automobile. Although the Civil Justice Reform Act of 2003 provides for "several liability" among joint tortfeasors, I do not believe the Supreme Court of Arkansas would construe that act to require an apportionment of fault among persons who are, by statute or by principle, vicariously liable for Jeb's acts.

The only bars to recovery are if the damages are so high that they exceed any insurance policy's limits and the defendants are not able to payout of their own pockets. In such a case, the Frost family will be entitled to a judgment that is effective for 10 years, and may potentially recover from the defendants (such as Jeb) as they acquire more property, so long as they stay out of bankruptcy. Any damages recovered should be apportioned pro rata.

July 2007 Wills, Estates & Trusts

Ashton K., a practicing Buddhist, marries Demi M., a practicing Scientologist, in 2000. Ashton has described Scientology as modern day voodoo to his friends. They move to Eureka Springs, Arkansas, where they purchase a chicken farm together as tenants by the entirety, which includes their residence, and 10 acres of land. Ashton has stock and royalties from his movies that is worth \$15 million dollars. He is the sole owner of the stock, his cash is in a bank account in his sole name, and his royalties are payable to him or upon his death to his estate. Ashton and Demi have a child, Bruce Jr., in 2002. Ashton executes a will in 2003, naming Demi his sole beneficiary and should she predecease him, leaving his property, both real and personal, to a testamentary trust benefiting Bruce Jr. until he reaches age 18, at which time all the assets of the trust are to be turned over to Bruce Jr.

Ashton executes his will in the office of Mike Malpractice, Arkansas lawyer in Eureka Springs. It is witnessed by Demi and Mike's secretary.

In 2004, Ashton, while intoxicated, takes out his will, sets it on fire in his house in front of witnesses, saying he has fallen in love with J Lo and doesn't want to leave Demi anything. The house catches on fire and Ashton passes out while attempting to extinguish the blaze. The witnesses drag Ashton from the burning house. He is hospitalized and given significant amounts of pain medication. The medication keeps him sedated, but lucid enough to know people's names and to respond to his nurse's questions.

Demi, while Ashton is in the hospital and taking the medication, comes to his hospital room and gets him to sign a new will naming Demi the sole beneficiary and should she predecease Ashton, his property both real and personal, will go to the Church of Scientology. The will is silent as to Bruce Jr. It is witnessed by his nurse and a janitor, who happened to be out in the hall sweeping and was called into the room by Demi. Neither witness sees Ashton sign the will, what appears to be his signature already being on the document, nor does Ashton say anything while the witnesses provide their signatures.

Ashton dies a week later.

Demi submits the new will to probate, claiming that she is entitled to all of Ashton's property.

1. Assume in response to this question that Ashton's first will is not revoked by burning it and a second original is produced for probate. Who would inherit his estate under that will and what would each beneficiary inherit? Explain.
2. What property, if any, would pass by operation of law outside of the estate and to whom would it go? Explain why.

3. What is required to demonstrate the intent to revoke a will?
4. Assume for this question that Ashton's second will is admitted to probate, the first will having been validly revoked. What grounds for challenges to this second will exist and who has the standing to make those challenges? Explain.
5. Assume the first will has been validly revoked for purposes of answering this question. If any of the challenges mentioned in response to question 4 are successful, who inherits from Ashton? Explain.
6. If the second will is found to be valid and admitted to probate, does Bruce Jr. have any rights of inheritance from Ashton that he can pursue? If so, explain how that would be done and the nature of those rights.

Arkansas Essay, July 2007

Wills, Estates and Trusts

1. To revoke a will in Arkansas the testator must either execute a new, valid will revoking all prior wills, or he must destroy the will with the intent to revoke it. Destruction of a will can occur when the testator purposefully burns, shreds, mutilates or otherwise physically destroys the will, or if he marks VOID (or its equivalent) across the face of the will. In this last instance, the markings must deface the actual writing on the will; marking VOID across the back of the will is ineffective.

2. If Ashton's first will was not effectively revoked and a valid copy was introduced Demi would normally inherit the entire probate estate. Because the original will designated Demi as the sole beneficiary, and because she is still alive and married to Ashton, she would inherit his stock, movie royalties, and bank account, because those assets were solely in his name and therefore could pass through the will. Bruce would not get anything because Demi survived Ashton, and he was specifically mentioned in the will, so he would not be a pretermitted (disinherited) child.

However, because the formalities were not followed in forming the will Demi will not be entitled to the entire estate. When a witness to the will is also a beneficiary, that person is only entitled to the lesser amount of 1) what is provided for them in the will, or 2) their intestate share. Because Demi is a beneficiary and witness to the will, and there was only one other witness (secretary), she will only be entitled to the share of Ashton's estate that she would have taken under intestate succession if Ashton had died without a will. In that case, the surviving spouse is entitled to her dower of 1/3 life estate in all

real property and 1/3 fee ownership of all personal property belonging to the decedent, if the decedent has surviving issue. Here, Ashton left Bruce as surviving issue so Demi would take her dower share of full ownership of 1/3 of his personal property (bank account, royalties, and stock), and Bruce would be entitled (through the testamentary trust) to 2/3 of the personal property. If Ashton had not left issue, she would be entitled to 1/2 fee ownership in both his real and personal property, subject to a reduction to 1/3 to satisfy creditors.

3. The chicken farm including the residence and 10 acres would pass outside of the probate estate, and would belong to Demi in fee simple. Because the couple owned the farm and residence as tenants by the entirety the surviving spouse has the sole right to the property by operation of law when the first dies.

4. The second will can be challenged on three grounds: 1) lack of formalities observed; 2) lack of testamentary capacity; and 3) undue influence. The person with standing to challenge the will is Bruce but, since he is a minor, his interest will be represented by a guardian.

Bruce has standing because if the second will is invalidated he will inherit through intestate succession, while if it is upheld he will possibly not inherit anything because of the clause leaving the estate to the church. If he successfully challenges the will (and he likely could) he will benefit from a favorable ruling, therefore Bruce (or his guardian) has standing.

The challenge for lack of formalities observed would be based on the fact that the witnesses to the second will did not actually witness Ashton signing the will. Arkansas requires that two witnesses sign the will only after they have personally witnessed the testator sign the will and attest that it is his last will and testament. In this case, it seems that the nurse was in the room at the time the will was signed, but the janitor was in the hall at the time, and neither actually saw him sign the will. Both signed as witnesses bases solely on request that they sign the will that was already purportedly signed by ashton. The fact that they did not see him sign the will increases the chance for fraud, in that Demi could have easily forged his signature then had them sign as witnesses.

Bruce could also claim that Ashton lacked the testamentary capacity to execute the will. Capacity requires that the testator know what property he owns, that he can appreciate that he is disposing of his property, and that he generally recognize the natural objects of his affection (family members). Intoxication, insanity, or minority generally bar a testator from having requisite capacity. In this case Ashton was sedated in the hospital and on significant amounts of pain medication. Most likely this rendered him incapable of appreciating that he was signing a will disposing of his property. In addition, the facts state that he did not like the church of Scientology, one of the primary beneficiaries, so it is likely that if he did sign the will that he did not appreciate what he was doing. Demi and the church could argue that he signed the will in a lucid moment. This argument could be effective in some cases, but is usually limited to the case when a person with

diminished mental capacity or mental disease has periods when he can fully appreciate

what he is doing and who his family is and executes a will during one of these periods.

The challenge for undue influence would be based on the fact that Demi apparently had sole access to Ashton while he was hospitalized and presented him with a will that she had drawn up. A party may not procure a testator's signature or consent to a will by using influence that overpowers the testator's own free will in executing the instrument, and a presumption of undue influence arises when the person supporting the will had the will drawn up herself and presented it to the testator to sign. In this case, Demi had the will drawn and signed by Ashton, while Ashton was at best in a weak state of mind, being in pain and hospitalized, giving rise to the appearance of undue influence.

5. If any of the above challenges are successful, Demi and Bruce will inherit Ashton's estate through intestate succession. If both the first and second wills are invalidated, then Ashton will have died intestate, and his estate will be distributed under the intestacy laws. As described above, Demi would take her dower 1/3 share because the two were married when Ashton died, and Bruce would take the remaining 2/3 as the sole surviving issue. The farm and residence would still go to Demi as a tenant by the entirety.

7. If the second will is upheld Bruce may still pursue his intestate share. At issue is whether Bruce was a pretermitted child under the second will. A pretermitted child is one who was unintentionally disinherited under a will. While a testator is free to disinherit a child for any or no reason, if a child is not mentioned in the will either because oversight or because he was born after the will was made he can claim his intestate share of the estate (here 2/3 of the personal property). In this

case, the will made no mention of Bruce, who was born when the will was executed, and there is no reason to believe that Ahston would have disinherited his young son, so Bruce can probably take his intestate share with priority over both Demi and the church.

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**ARKANSAS BAR EXAMINATION
JULY, 2007**

**2 Pages
PROPERTY**

After a lengthy divorce in Texas, Big Time Lawyer finally received a division of the community property he and his wife had acquired during his 20 year law career. Seeking the opportunity to take advantage of the Arkansas class action practice, Big Time Lawyer moved to Arkansas and brought his already acquired Arkansas License.

Prior to moving, he married his real sweetheart, "Cup Cakes". To show his love for Cup Cakes and their new life in Arkansas, he bought a large and lovely home in Arkansas with part of the money he was able to salvage from his Texas divorce. Big Time lawyer had the deed placed in his name and Cup Cakes' name. He also opened a bank account in his and Cup Cakes' name. Big Time Lawyer set up his law practice in his name only and immediately had great success with large fees. He used his separate assets from the sale of his Texas law practice to purchase the office, land and building where his Arkansas office was located. He takes title in his name only. He uses the large ranch he got in the Texas divorce to swap for a larger ranch in Arkansas. The title to the Arkansas ranch is placed in his name only.

Cup Cakes, after moving to Arkansas with her husband, inherits 5,000 shares of Wal-mart stock. Being the loving person she is, she had the stock issued in her name and the name of her husband. She also inherits a tract of Texas land from her family.

Big Time Lawyer sells the Arkansas ranch by warranty deed without joinder of Cup Cakes, to Cowboy Bob and puts the \$1,000,000.00 in an account solely in his name.

Big Time Lawyer executes a will leaving all of his estate to his two children. Cup Cakes executes a Will leaving all of her estate to her daughter.

In answering the following questions, limit your answers to issues regarding the ownership rights to the following property:

- a) lovely home in Arkansas
- b) bank account
- c) law firm office building in Arkansas
- d) proceeds from Arkansas ranch sale
- e) any interest in Arkansas ranch sold
- f) Cup Cakes' Texas land - what state law should apply? Would Arkansas dower or curtesy law apply?

- I. If Cup Cakes dies leaving Big Time Lawyer, her daughter, and his two children, and her Will is properly probated, what property does each of the following own?
- A) Big Time Lawyer? Why?
 - B) The Daughter of Cup Cakes? Why?
 - C) Big Time Lawyer's two children? Why?
- II. If Big Time Lawyer dies leaving Cup Cakes, her daughter, and his two children, and his Will is properly probated, what property does each of the following own?
- A) Cup Cakes? Why?
 - B) The daughter of Cup Cakes? Why?
 - C) Big Time Lawyer's two children? Why?

Arkansas Essay, July 2007

Property

1.

A) BIG TIME LAWYER

a) Big Time Lawyer will take absolute ownership of the lovely home because he and Cup Cakes held the property as Tenants by the Entirety. In Arkansas, it is presumed that when property is conveyed in the name of a husband and wife that they take as tenants by the entirety, as opposed to the default tenants in common. A tenant by the entirety cannot be extinguished except by divorce or through joint transfer by the husband and wife, and it includes a right of survival. Therefore, because Cup Cakes died before Big Time Lawyer, he takes Cup Cakes share and owns the house in fee simple absolute.

b) Similarly, Big Time Lawyer will have sole ownership of the bank account. Joint bank accounts must generally specify if they include right of survival, but once again Big Time Lawyer and Cup Cakes hold as husband and wife, so the right of survivorship is presumed.

c) Big Time Lawyer will also retain sole interest in the law firm office building in Arkansas. The property is held in his name only and Cup Cakes had never contributed any interest into the purchase such that she would have any kind of interest that would qualify as part of her heiritable estate. Her dower interests that she would have in the building, because it was property acquired during the marriage, are not devisable because they extinguish at her death.

d) Cup Cakes would have had rights as to the income from the sale of the ranch because any property conveyed without her consent was subject to her dower rights, but that interest was not

devisable to her daughter because, as explained above, such an interest is not devisable.

Therefore, Big Time has sole ownership.

e) Again, Cup Cake would have had an interest in the property because of her dower rights which she did not waive by consenting to the transfer. She would have been able to claim her interest against Cowboy Bob within seven years. However, this was not a devisable interest and extinguished at her death

f) In the case of Cup Cakes interest in the Texas land, Texas law should apply.

Generally, when real property is located outside the state where the will is being probated, the will must also be probated in the state where the property is located (the state that would have in rem jurisdiction over the property) in order to distribute the property. However, the Texas court may choose to apply the Arkansas law of dower and curtesy to the distribution of the property depending on several factors, such as a balance of Arkansas's and Texas's interest in settling the matter or which state's would be considered the best law to apply.

CUPCAKES DAUGHTER

a) Her daughter will not have any interest in the lovely home because, as explained above, the home was held as tenants by the entirety and upon Cup Cakes's death, sole ownership passed to Big Time Lawyer. Cup Cakes's will provision for her daughter cannot override Big Time Lawyer's survivorship rights.

b) The same analysis also applies to the bank account so that her daughter has no interest in it. If, however, Big Time and Cup Cakes has not been married, unless the joint bank account specified right of survivorship, her daughter would be entitled to Cup Cakes's share.

c) As explained above, there was no interest that in the law office building that Cup Cakes could have passed to her daughter through her heritable estate.

d) and e) As explained above, Cup Cake did not have a devisable interest in this property, so her daughter inherits no interest in it.

f) Cup Cakes daughter will take the Texas land subject to the determination of a Texas court of any curtesy interests on the part of Big Time.

C) BIG TIME LAWYERS TWO CHILDREN

His two children do not have any interest in the property other than to the extent they may inherit portions from their father. Because he is still alive none of his interests have yet passed to them. Further, because they are Cup Cakes's step-children, they are not entitled to inherit anything from her. The fact that she left them out of her will is irrelevant because the two children cannot qualify as pretermitted children (who would be entitled to take their intestate share of Cup Cakes's estate) because they are step-children. Only marital children, adopted children, or non marital children who have been acknowledged as the child of the deceased are protected by the pretermitted child statute.

2.

A) CUPCAKES

a) She will have sole ownership of the lovely home because, as explained above, she and Big Time held the home as tenants by the entirety. Although Cup Cakes was omitted from Big Time's will and would, therefore, be entitled to dower, this is preferable because under dower

she would only take a 1/3 life estate and through the tenancy by the entirety she takes sole ownership.

b) Cup Cakes will also have sole ownership of the joint bank account because it was held as tenants by the entirety.

c) Even though Cup Cakes was omitted from Big Time's will, she is entitled to dower rights in all property they owned during marriage. She will retain a 1/3 life estate in the law office building (1/2 life estate if Big Time had had no children).

d) Under Cup Cakes dower rights she is also entitled to 1/3 outright ownership (again, 1/2 if he had had no children), in Big Time's personal property, so she will take 1/3 of the \$1,000,000 proceeds of the sale of the ranch (about \$333,333).

e) Because of Arkansas's dower and curtesy laws, any transfer in land by one spouse (no matter how the ownership is titled) must include the consent of the other spouse. Here, because Big Time did not have Cup Cakes's consent, evidenced by signature on the deed, Cowboy Bob takes the land subject to her dower interest. However, her ability to assert that right in the land is extinguished after 7 years.

f) Cup Cakes's Texas land will belong solely to her. Similarly, to the analysis of the lawyer's building when Cup Cakes predeceased him, there is no other interest that anyone could take apart from Big Time's curtesy interest in the land, which would not be devisable in any case as it terminates at his death.

B) THE DAUGHTER OF CUPCAKES

She is in the same boat as Big Time's two sons were in the previous analysis. She is a step-child and is not entitled to anything under Big Time's will or the pretermitted child statute. However, she may eventually inherit the personal property that Cup Cakes received outright from Big Time's estate because of her dower interest.

C) BIG TIME LAWYER'S TWO CHILDREN

With the exception of the home and the bank account which are solely Cup Cakes, the two children will take the remainder of Big Time's estate subject to any debts and creditors and Cup Cakes 1/3 life estate interest in real property and 1/3 absolute ownership in personal property. Further, Cup Cakes is entitled to \$4,000 worth of excluded personal property from the estate (which can be reduced to \$2000 by creditors or must be split with Big Time's children if they are minors) and a reasonable sustenance allowance for the next two months. Because of her ownership of the house, the homestead allowance will not apply. Big Time's two children will take subject to these interests.

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EQUITY & DOMESTIC RELATIONS

At issue in a case in Arkansas between Husband and Wife are grants of stock options which Husband has received in connection with his employment during the marriage.

Some of the stock options received by the Husband are exercisable immediately, meaning that Husband can acquire the stock if he wishes by paying the price stated in the option granted. Other options have been awarded to the Husband but are not exercisable until five months from now and expressly require that the Husband be a full-time employee of the company five months from now.

Husband has been guilty of numerous acts of adultery occurring before and after the date the Wife commenced an action (for something other than divorce) against the Husband. The separation was due to no fault on the Wife's part. The Husband counterclaimed against the Wife's action, seeking a full divorce.

Wife asserts that the parties have been continuously separated for twelve months. The Husband claims the parties have been separated for twenty months. The Husband marks the time from the date when he first moved out. The Wife bases her claim about the length of separation on the following facts: twelve months ago the Husband moved back into the marital home with her for three days and, while back at home, he jointly prayed with her about their reconciliation. During the three days, the parties did not share a bedroom nor did they have sexual intercourse.

Questions

1. Describe the laws in Arkansas pertaining to property division upon divorce.
2. Assume that a divorce is granted three months from now in the Husband's favor based on his counterclaim. Provide a reasoned opinion based on the above assumption and the fact situation stated above whether any of the stock (which is the subject of the stock options granted to the Husband) constitutes marital property and is subject to division upon divorce. Tell how, if at all, you expect the stock to be divided on the date of divorce.
3. Disregard the assumption that the Husband will be granted a divorce three months from now. Based on the fact situation, describe the cause of action (other than divorce) which was likely filed by the Wife to commence the case. Would filing such an action increase her chances of obtaining one-half of all of the stock at some point in the future? If so, explain how.

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Equity and Domestic Relations

1. Arkansas divides property on divorce based on the nature of the ownership of the property. Property owned by one spouse prior to the inception of the marriage generally remains the separate property of that spouse on divorce. If separate property is sold or converted during the marriage, and the proceeds are kept separate and traceable, those proceeds will also be deemed separate property on divorce. If the owner-spouse either makes a gift of the separate property or it becomes so intermingled with marital property that it cannot be distinguished or traced, the property becomes marital property for purposes of division on divorce. Likewise, property received by one spouse during the marriage by gift, inheritance, life insurance, etc. is separate property unless intermingled or gifted to the other spouse.

For property that is acquired by either spouse during the marriage, either in one name only or jointly, that property is deemed to be marital property. Marital property includes earnings of one spouse from his labor during the marriage, property purchased from such earnings, lottery winnings, vested retirement accounts, rents from joint property, and most other acquisitions made during a marriage. Generally on divorce a court will divide marital property equitably between the parties (as close to 50/50 as possible), and fault leading to the divorce is not considered. However, the court has discretion to make a non-equitable distribution if one party can show hardship, unfairness of the distribution, etc. In making such a distribution the court must make specific findings as to why it is not dividing the property equally.

2. The vested stock options at the time of the divorce will be deemed marital property and will be divided; the stock options that are not vested will not be marital property and will not be divided. At issue is whether the husband has a present possessory right to exercise his stock options at the time of the divorce. Generally, stock options that are granted to a married employee because of work they performed during the marriage are considered marital property and will be divided on the divorce. In this case, husband is vested in all of the stock options which husband has an immediate right to exercise, and those would be deemed marital property (subject to division) if the rights to those options were the result of work done during the marriage. However, the options that he does not have a present right to exercise are not vested, and will not be vested for two months after the divorce. These might be treated like a pension, which the spouse has no claim to unless the employee-spouse is vested at the time of divorce, or they might be treated like a contingent fee, where the court waits to see what the eventual value of the property is after the divorce and divides it at that time. If the options are treated like a retirement plan wife will only be entitled to divide the vested stock options. If treated like a contingent fee, the court will look at the amount of time the couple was married compared to how long husband had to work to earn the options, and figure up a formula to divide the unvested stock.

3. Wife most likely filed a cause of action for separate maintenance or divorce from bed and board (or both) to commence the case. Divorce from bed and board in Arkansas allows the filing spouse to be granted a partial divorce, while neither spouse can remarry until a full divorce is granted. A claim for separate maintenance is a claim that a spouse

who is separated needs pre-divorce financial support from the other spouse (generally the one who is the principal income earner). A claim for separate maintenance can be sustained independent of any other action, and a court will look at the relative financial positions of the parties and generally award maintenance on the same grounds that it would award alimony (considering accustomed lifestyle, childcare, medical needs, necessities, housing costs, etc.).

Filing such an action would probably have no effect on wife's chances of obtaining one-half of all the stock one way or the other. Generally, marital property accumulates until the day the divorce is granted, regardless of whether the couple have been living separately, whether or not maintenance has been granted, and whether or not one party is at fault. Wife will be entitled to division of the stock options as of the date of divorce, regardless of the original action, as discussed above.

4. Arkansas courts will generally enforce a post-nuptial agreement entered into by cohabitating spouses if it is entered voluntarily, with full disclosure of assets, and is not fundamentally unfair. As with pre-nuptial agreements, courts will allow persons to contract for anything that is not illegal or against public policy. The court will strictly construe the agreement to ensure voluntariness, disclosure, and fairness, because spouses owe each other a fiduciary duty to deal fairly and honestly with each other.

Factors going to voluntariness include whether one spouse used fraud, deceit, or duress to induce the other to sign the agreement. If so, the agreement will not be valid. Similarly, if the spouse

proposing the agreement does not disclose all of his or her assets at the time of the agreement (they should probably be documented in the contract), and such a mistake is not deemed to be honest or minor, the agreement will be invalidated. Fundamental fairness goes to the idea that one spouse will gain disproportionately from the agreement, and the other will disproportionately suffer. If the agreement is unfair it will be invalidated. To be considered with all of these factors is whether the spouse challenging the agreement had her own separate counsel. If she did, the court is more likely to uphold it because that is strong evidence that she made an informed, voluntary, and intelligent decision.

In addition, the agreement must satisfy the statute of frauds and be signed by the party being charged (the proponent).